No. 83-511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE CONTINENTAL GROUP, INC.,

Petitioner,

v.

VERONICE A. HOLT,

Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S REPLY

First. Respondent Veronice A. Holt ("Holt") asserts that she may base her standing to sue for injunctive relief solely on injury to third parties because the case or controversy requirement of Article III applies only to private plaintiffs seeking relief in federal court against the exercise of governmental power or when issues of federalism are implicated. (Brief in Opposition ("Br. Op.") at 1-5). She has cited no case which supports this remarkable proposition in the least. The case or controversy prerequisite to Article III jurisdiction has never been so limited; this Court has repeatedly required compliance with Article III standing requirements in cases involving only private parties. *See, e.g., Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 373 (1982); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 209-10 (1972);* *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 272 (1941).

* *Trafficante*, cited by Holt as a case where a litigant was permitted to litigate the rights of third parties, held nothing of the kind. What the Court held was that a personal injury — the loss to plaintiffs of "important benefits of interracial association" — was sufficient injury to satisfy Article III. 409 U.S. at 209-10. Indeed, the Court predicated its holding upon the fact that "[i]ndividual injury or injury in fact to petitioners, the ingredient found missing in *Sierra Club* v. *Morton*, 405 U.S. 727, is alleged here." 409 U.S. at 209. Justice White, concurring, questioned whether absent the Civil Rights Act of 1968 the personal injury alleged by plaintiffs was sufficiently concrete to satisfy Article III. Plaintiffs did not even assert that they had standing by virtue of injury to third parties.

Moreover, Holt is incorrect in assuming that no considerations of federalism are involved in this case. Title VII unambiguously reflects Congress' intent that state agencies play an active role as guarantors of Title VII in the first instance. *See* 42 U.S.C. § 2000e-5(c). *Cf.* H. Rep. No. 92-238, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. and Admin. News 2137, 2146 (1972) ("Administrative tribunals are better equipped to handle the complicated issues involved in employment discrimination cases"). In fact, Holt sought the preliminary injunction at issue here pending state administrative review of her charges by the Connecticut Commission on Human Rights and Opportunities. To the extent that Article III standing requirements are ignored in favor of the rule adopted by the Second Circuit permitting an individual employee to seek injunctive relief on behalf of third parties, the initial focus of Title VII litigation seeking to resolve those "complicated issues involved in discrimination cases" would shift from state agencies to the federal courts — a result clearly not intended by Congress.

Second. Holt seems to argue, without citing any statutory provisions, legislative history or judicial authority, that Title VII provides her with standing to seek injunctive relief to vindicate injuries to third parties even absent injury to herself. (Br. Op. at 17-18) But even assuming *arguendo* this extremely dubious proposition that Congress could have, consistent with Article III, removed traditional limitations upon standing to the extent of authorizing Holt to litigate the "chilling effect" of her discharge on Continental's remaining employees (*see Havens Realty Corp.* v. *Coleman*, 455 U.S. at 372-73; *Warth* v. *Seldin*, 422 U.S. 490, 498-99, 501 (1975)), it has not done so either expressly or by implication. Indeed, it is clear that Congress intended to require employees bringing Title VII actions to establish irreparable injury to themselves in the manner that equity has traditionally required. *See* Petition for Certiorari at 7-8. Thus Holt lacks the "personal stake in the outcome" of any controversy which other employees might have with Continental that is required to justify exercise of a federal court's remedial powers in her behalf. *Warth* v. *Seldin*,

422 U.S. at 498-99. Any claim that other employees may suffer a "chilling effect" is one that *they* would have to allege, and cannot support standing for Holt's injunction action. *City of Los Angeles* v. *Lyons*, U.S. , 103 S.Ct. 1660, 1665-69 (1983).

Third. Holt argues that she must have standing because her discharge has allegedly resulted in injury to her. (Br. Op. at 5-12) She ignores the teaching of *Lyons*, however, that just because a plaintiff has alleged personal grievances sufficient to satisfy Article III, it does not follow that she also has standing to obtain relief to redress grievances of third parties. Continental neither contests nor has contested Holt's standing based on injury to her alleged in her complaint to seek injunctive relief. Holt did attempt to demonstrate irreparable injury to herself from her discharge, but, as the District Court found and the Court of Appeals affirmed, she failed to satisfy her burden. *Holt* v. *The Continental Group, Inc.*, 542 F. Supp. 16, 17-18 (D. Conn. 1982) (Appendix to Petition for Certiorari at A15-17); *Holt* v. *The Continental Group, Inc.*, 708 F.2d 87, 90-91 (2d Cir. 1983) (A6-9). But the fact that Holt had standing to litigate the question of whether she had been irreparably harmed does not give her standing to litigate the putative "chilling" of the rights of other employees any more than the fact that *Lyons* had alleged a cause of action for damages to redress the injury he had suffered gave him standing to vindicate the rights of third parties allegedly exposed to injury. *City of Los Angeles* v. *Lyons*, 103 S.Ct. at 1669.

Fourth. Holt asserts that "Continental never . . . raised the question of standing in the lower courts." (Br. Op. 2, 21-22). This is erroneous. In fact, Continental argued before the District Court in its Memorandum in Opposition to Plaintiff's Request for a Preliminary Injunction and in Support of Defendant's Motion to Dismiss, to Strike, and for a Protective Order (excerpt attached hereto as Supplementary Appendix A, at Supp. App. 2) that to the extent Holt alleged in her complaint that her discharge had a "chilling effect" on third parties, "Holt lacks standing to raise this claim." In response to Holt's argument before

the Court of Appeals that the "chilling effect" of her discharge fulfilled the irreparable harm requirement for a preliminary injunction, Continental argued in its Brief for Defendant-Appellee (excerpt attached hereto as Supplementary Appendix B, at Supp. App. 3) that the alleged "chilling effect" of Holt's discharge upon the rights of third parties could not establish the irreparable harm to her required for injunctive relief. In addition, since Continental was the appellee in the Second Circuit, it was not required to reassert every argument presented to and accepted by the District Court in order to avoid waiver.* Following the Second Circuit's decision, Continental petitioned unsuccessfully for rehearing on the basis of *Lyons* and its antecedents. (A20-21)**

CONCLUSION

For the foregoing reasons and for those stated in the Petition for Certiorari, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Dated: January 12, 1984

Respectfully submitted,

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* It does not follow, of course, from the fact that on appeal Continental did not challenge the District Court's jurisdiction under 42 U.S.C. § 1981 to adjudicate Holt's claim of retaliatory discharge, that Continental thereby acknowledged Holt's standing to redress the alleged injuries of third parties.

** Moreover, Holt's standing to request relief is a question of subject matter jurisdiction that cannot be waived. *See University of California Regents* v. *Bakke*, 438 U.S. 265, 379, 380n.1 (1978) (White, J., concurring); *United States* v. *Griffin*, 303 U.S. 226, 229 (1938); *Louisville & Nashville R.R. Co.* v. *Mottley*, 211 U.S. 149, 152 (1908); *Mansfield, Coldwater & Lake Michigan Rwy. Co.* v. *Swan*, 111 U.S. 379, 382 (1884).

SUPPLEMENTARY APPENDICIES

Holt claims that unless she is reinstated CGI will have succeeded in creating a "chilling effect on the exercise of the legal rights of all persons protected by Title VII. . . and the Civil Rights Acts of 1866 and 1870 who are employed by Defendant." (Complaint, ¶66).

Holt offers no legal or factual basis for this argument and it must be dismissed. Nowhere in her voluminous filing with this Court does Holt refer to another CGI employee who, as a possible discrimination victim, may be deterred from exercising protected statutory rights based on Holt's current circumstances. To the contrary, Holt's claims are purely personal, representing the interests of nobody but herself.

Holt purports to be, in effect, a private attorney general under statutes

which encourage voluntary rather than coerced compliance. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44-45 (1974). Holt's position as a CGI attorney required her to assist in achieving compliance, not collecting alleged injustices to support her personal claims. (Comp. ¶ 8). Compare Smith v. Singer Co., 650 F.2d 214 (9th Cir. 1981). Thus, besides lacking evidence, Holt lacks standing to raise this claim. Even if the Commission, rather than Holt, asserted this "chilling effect" as a basis for injunctive relief, it would have to make a substantially stronger showing than Holt even attempts. EEOC v. Anchor Hocking Corp., 666 F.2d 1037 (6th Cir. 1981).

Holt cites Mead [Mead v. United States Fidelity and Guaranty Co., 442 F.Supp. 114 (D. Minn. 1977)] for the proposition that irreparable harm exists in the "chilling" of other employees' exercise of their statutory rights. However, the Mead injunction was also a final remedy, issued after a full trial on the merits and only after chilling effect was proven to the court. Holt had made no showing of how her discharge affected anyone else, much less how such showing could constitute "irreparable harm" to her. A showing by the cognizant agency that a firing had deterred other discrimination victims from testifying was rejected as insufficient for a preliminary injunction in EEOC v. Anchor Hocking Corp., 666 F.2d 1037 (6th Cir. 1981).

Finally, Holt cites Sheehan v. Purolator Courier Corp., 676 F.2d 877 (2d Cir 1982), for the proposition that the injuries she lists are now "recognized" as "irreparable in nature" (Br. 44), relying on this passage from the majority opinion:

> "Unimpeded retaliation during the now-lengthy (180-day) conciliation period is likely to diminish the EEOC's ability to achieve conciliation. It is likely to have a chilling effect on the complainant's fellow employees who might otherwise desire to assert their equal rights, or to protest the employer's discriminatory acts, or to cooperate with the investigation of a discrimination charge. And in many cases the effect on the complainant of several months without work or working in humiliating or otherwise intolerable circumstances will constitute harm that cannot adequately be remedied by a later award of damages."

Id. at 886-87

A fair reading of this passage shows that in the first two sentences the court was merely reconciling the statutory scheme of Title VII -- conciliation,

investigation, rights to protest or assert claims -- with its holding that a district court has jurisdiction to issue a preliminary injunction in aid of a private plaintiff who does not yet have a right-to-sue letter. The Sheehan majority did not expand the concept of "irreparable harm." It referred to it only in the last sentence, and then in traditional terms of "intolerable" hardship or humiliation. In fact, the Sheehan majority explicitly stated at the close of the opinion:

> In delivering this opinion, we do not alter the traditional showing that a party must make in order to persuade the court that injunctive relief is appropriate.

Id. at 887.